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ABSTRACT

The memorandum discusses three Supreme Court decisions on special education as well as related cases decided by the U.S. Courts of Appeal. Irving Independent School District v. Tatro is the first case addressed and the implications for provision of related services under P.L. 94-142, the Education For All Handicapped Children Act, are analyzed. Specifically, the question of whether clean intermittent catheterization for a child with spina bifida constitutes a related service is examined. The second case, Burkington School Committee v. Department of Education of Massachusetts, is explored in terms of the court's ruling on reimbursements for private school placements. The final case, Smith v. Robinson, touched off a move in Congress to overturn the Court's decision limiting the ability of parents to recover attorney's fees in cases asserting the educational rights of a handicapped child. (CL)

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THE SUPREME COURT ON SPECIAL EDUCATION: AN UPDATE

Introduction

The United States Supreme Court established legal standards for public school programs for handicapped children in its 1982 decision in Board of Education v. Rowley.[1] The Supreme Court's interpretation of the Education for All Handicapped Children Act (EAHCA)[2] in the Rowley case, its earlier decision in Southeastern Community College v. Davis[3] on the meaning of Section 504 of the Rehabilitation Act of 1973,[4] and the import of related federal appellate decisions that the Court declined to review were discussed in an earlier Legal Memorandum.[5]

The guidance the Supreme Court gave the lower courts in the Rowley case did not, however, abate the flood of lawsuits in the lower courts about the educational rights of handicapped children, and school administrators have become increasingly concerned about the impact of the resulting judicial decisions on public school programs and resources. In one recent case, for example, a federal appellate court ordered a school district to place a handicapped child in a private school program at a cost of $88,000 per year.[6] As part of another lawsuit, the child's parents asked a federal court to order the school system to pay them $55,000 in fees for five different attorneys.[7]

Since its 1982 decision in Rowley, the Supreme Court has issued opinions in three more cases that expand its interpretation of the EAHCA and limit the use of Section 504 and a federal civil rights statute[8] in cases to which the EAHCA is applicable. This Legal Memorandum discusses these three Supreme Court decisions and related cases decided by United States Courts of Appeal.

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Related Services: Irving v. Tatro

The heart of the EAHCA is the requirement that the public schools give a "free appropriate public education" to each handicapped child. In Rowley, the Supreme Court said a school meets this mandate when it provides: "...personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction".[9] The "support services" that the High Court included in its definition of a free appropriate public education are called "related services" in the EAHCA, and, in its 1984 decision in Irving Independent School District v. Tatro,[10] the Supreme Court explained the scope of the law's requirement that a public school system provide related services to a handicapped child to permit the child to benefit from special education.

The EAHCA defines related services as:

> ...transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping condition.[11]

The federal EAHCA regulations extend this definition to include school health services, social work services, and parent counseling, and they require that the child's IEP include a list of the related services to be provided.[12]

Perplexing and legally difficult disagreements about related services have reached the courts when parents have requested that public schools provide or pay for medical treatment or life-support services as part of the "support services" the Supreme Court included in its definition of a free appropriate public education. Medical treatment and life-support services for a handicapped child can be very costly. School administrators have in some cases denied parent requests for them, asserting that there is no legal requirement to provide such services because the law's definition of related services clearly limits medical services to only those necessary for diagnostic and evaluation purposes.

The case the Supreme Court chose to decide, Irving v. Tatro, concerned the refusal of a Texas school district to provide clean intermittent catheterization (CIC) during school hours so that a three-year-old girl suffering from spina bifida and a neurogenic bladder would be able to attend the school district's early childhood development program for handicapped children. The United States district court that first heard the case rejected the parents' claim that CIC should be considered a related service, finding instead that it was a life-support service that the school district could not be required to provide. The court supported its decision by pointing to the law's definition of related services, one that specifically limits medical services to those

necessary for diagnostic and evaluation purposes. The judge recognized that the child's plight argued for a humane decision, but he was also aware of the almost unlimited array of medical and life-support services that school districts might be called upon to supply if the law were interpreted broadly.[13]

The United States Court of Appeals for the Fifth Circuit, however, reached a different conclusion.[14] The appeals court found that CIC must be considered a related service in this case because without it the child would be unable to attend school and benefit from the special education to which she was entitled. The Fifth Circuit said the lower court's fear that school districts might be asked to provide handicapped children with a variety of expensive medical or life-support needs was unfounded because the law itself limited the related services that can be required. When further proceedings in the case[15] resulted in the school district's being ordered to provide the CIC, school officials convinced the Supreme Court to review the issue.

The Supreme Court found it had to answer two questions to determine if CIC was in this case a related service under the EAHCA. The first question was whether CIC was a "supportive service" that the child required to benefit from special education; the second was whether or not CIC should be excluded from consideration as a related service because it was a medical service for other than diagnostic and evaluation purposes.

The Justices concluded that CIC is a "supportive service" when, as in this case, it is necessary to permit the child to attend school. The Court said: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned."[16]

Answering the second question was more difficult because CIC in this case was clearly a medical service for other than diagnostic or evaluation purposes. Nevertheless, the Court decided that the school district should be required to provide it as a related service. The Justices said the EAHCA regulations defined medical services as those provided by a licensed physician, but in this case, the record established that the CIC did not require a doctor. It could be administered by a school nurse or even a trained lay person. The Court also emphasized that school health services are part of the related services the federal regulations specifically require for handicapped children and that school nurses have long been a part of the health services available to public school students.[17] For all these reasons, the Court held the school district had a legal obligation to provide CIC.

The Justices took some pains, however, to emphasize the limits on their decision in the Tatro case and to allay fears that the EAHCA's mandate for related services might become the legal basis for requiring school districts to pay for many exotic and expensive medical services for handicapped children. The Court said that only children sufficiently handicapped to need special education can claim related services, and then only if the services are required to permit the child to benefit from the special education. The

school district has no obligation to provide nursing services or to administer a medication or treatment that can appropriately be administered to the child other than during the school day.

In addition, the Justices said that any services that must be performed by a licensed physician are excluded from the related services the school district must pay for or provide. Finally, the Court implied that a school district is not under an obligation to furnish any specialized equipment the child may require in connection with the related services being requested.[18]

Since its decision in Tatro, the Supreme Court has declined to review two cases in which appeals courts have ruled on other related services. The first is a decision of the United States Court of Appeals for the Ninth Circuit holding that the related services a school district can be required to provide include lung suctioning and maintenance of a tracheostomy tube for a child suffering from cystic fibrosis and tracheomalacia.[19] The Ninth Circuit ruled that these services fell within the "school health services" that must be provided by the school nurse or other qualified member of the school staff.[20]

The second decision left standing by the Supreme Court concerns the legal obligation of school districts to provide psychotherapy as a related service, an issue about which federal trial courts have been in disagreement. [21]

Although the EAHCA's definition of related services includes both psychological services and counseling services, psychotherapy is considered by many to be a medical treatment. Some states provide by law that it may be administered only by a licensed physician, and the Supreme Court's decision in Tatro precludes requiring a school district to provide as a related service any treatment that must be given by a licensed physician.

In spite of that, the Supreme Court has declined to review a decision of the Third Circuit Court of Appeals that a school district can be required to pay for psychotherapy when it is an integral part of a hospital treatment program into which the district placed the student and when the so-called psychotherapy was actually provided to the student by a social worker acting under the supervision of a trained psychiatrist. [22]

Reimbursement for Private School Placements: Burlington v. Department of Education

The legal obligation of school districts to reimburse parents who place their handicapped child in a private school because they are dissatisfied with the public school program is a contentious issue and one that has divided the federal appellate courts. [23] The EAHCA requires both the school district and the parents to maintain the handicapped child in his or her current educational placement during the due process procedures the law mandates to resolve any disagreements. [24] Nevertheless, the courts have frequently been faced with parents who have removed the child from a public school program, placed the child in a private school program of their own choice, and then demanded that public school officials pay the cost of the private school.

In 1981, the United States Court of Appeals for the Fourth Circuit ruled, in the case of Stemple v. Board of Education,[25] that parents who ignore the law's requirement to maintain the child's current placement during due process forfeit any right to payments from public funds for the private school placement they select. Several federal appeals courts accepted the Stemple rule,[26] but others held that parents who disregarded their legal duty to maintain the child's placement during due process should nevertheless be permitted to win reimbursement for the cost of the private school they selected.[27] The Supreme Court resolved these disagreements on April 29, 1985, in the case of Burlington School Committee v. Department of Education of Massachusetts.[28]

The case concerned a learning disabled student whose parents placed him in a private school at their own expense when they became dissatisfied with the program offered by the public school system. When an independent hearing officer decided that the school district should pay the cost of keeping the child in the private school, school officials sought judicial review, arguing, among other things, that his parents forfeited the right to recover the costs because they unilaterally removed the child from the public school program in violation of the law.

Although the case followed an unusually complex procedural path,[29] the Supreme Court eventually agreed to review two of the many legal issues decided by the First Circuit Court of Appeals: (1) whether courts may award parents reimbursement for private school tuition and related expenses, and (2) whether the law's requirement to maintain the child in the current educational placement bars a court from awarding reimbursement for the cost of a private school if the parent places the child there during due process without the consent of public school officials.

The Supreme Court decided that the EAHCA does authorize courts to award parents the cost of private school placements in a proper case. It held that Congress intended such awards to fall within the power Congress gave the Court in an EAHCA case to "grant such relief as it determines is appropriate." The Court also ruled that parents do not automatically forfeit the right to claim reimbursement for a private school placement when they violate the law's requirement to maintain the current placement during due process or obtain the agreement of school officials for any change.[30]

The Supreme Court reasoned that the administrative and judicial due process to settle a disagreement between parents and a school district can take a year or more to complete. Parents should not be required to keep a child in a public school placement they believe inappropriate for that length of time. On the other hand, the public schools should not have to pay for a private school placement of the child if they are offering an appropriate program for the child in the public schools.

To resolve this conflict, the Court ruled that parents who place a child in a private school without consent of local school officials during a dispute over the appropriateness of the public school program do so at their own financial risk, and only if a court finally determines that the program

offered by the public schools was not appropriate for the child, may the parents win reimbursement for the private school costs. This decision, according to the Court, "...merely requires [a school district] to belatedly pay expenses it should have paid all along if it had developed a proper IEP."[31]

In addition, the Justices said it would violate the EAHCA's intent to give a child both an appropriate and a free education if "...parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement."[32]

The Supreme Court's decision in this case provides a powerful incentive for public schools to be certain that they are providing an appropriate program for each handicapped child, but, at the same time, it places parents on notice that they take a substantial financial risk when they violate the EAHCA's requirement to maintain the current placement during the resolution of a dispute over the child's educational program.

Attorney's Fees: Smith v. Robinson

May a court require a public school district to pay the attorney's fees of parents who are successful in court in EAHCA cases? May parents add legal claims under Section 504 or Section 1983 of the Civil Rights Act of 1871 to an EAHCA case for the purpose of winning attorney's fees if the case is successful? Because the federal appellate courts were in sharp disagreement about these very controversial legal questions,[33] the Supreme Court decided them in July 1984 in the case of Smith v. Robinson.[34]

The EAHCA does not explicitly authorize the awarding of attorney's fees to parents who convince a court that a school district has failed to provide the required free appropriate public education to a handicapped child. For that reason, attorneys for parents have sometimes added allegations of violations of Section 504 or Section 1983 of the Civil Rights Act of 1871 to cases brought under the EAHCA to justify a request for attorney's fees. In Smith v. Robinson, the Supreme Court sharply limited the ability of parents to recover attorney's fees in cases asserting the educational rights of a handicapped child.

The Court held that Congress intended the EAHCA to be the exclusive means of enforcing the handicapped child's right to a public education. It held further that the Congress did not include a provision for the awarding of attorney's fees in the EAHCA because it recognized the heavy financial burden placed on the States by requiring them to provide an appropriate education for every handicapped child. The Justices were unwilling to allow Section 504 or Section 1983 to be used to add to that burden the cost of attorney's fees.[35]

The decision in Smith v. Robinson touched off an immediate move in Congress to overturn the Court's holding by enacting specific amendments to the law.[36] Among other things, some of the proposed amendments would: (1) allow parents to use both Section 504 and Section 1983 in addition to the

EAHCA to assert the educational rights of handicapped children, (2) permit courts to award attorney's fees to parents in cases brought under the EAHCA (courts already have the authority to award attorney's fees in Section 504 and Section 1983 cases), (3) allow parents to recover attorney's fees for work done in the administrative due process hearings. On the other hand, it would require parents to exhaust administrative due process procedures in all cases before going to court. Although no bill has been passed yet, school administrators should monitor the progress of the several proposals and be aware of Congress' final decision because the cost of attorney's fees in a case involving the education of a handicapped child can easily exceed the cost of providing the educational program for the child.[37]

Conclusion

The three Supreme Court decisions discussed in this Legal Memorandum have resolved some important questions about the legal obligation of the public schools to provide for the education of handicapped children under the EAHCA, questions about which the lower courts have been in disagreement. But the number of new cases involving handicapped children that come into the lower courts each year and the complexity of the law governing their educational rights make it likely that the Supreme Court will be asked in the future to settle other legal questions abut the EAHCA and other federal statutes touching the education of handicapped children.

If Congress decides to reverse the Court's holding in Smith v. Robinson, special education law may become even more complex as the lower courts struggle again with the proper interrelationships among at least three separate federal statutes, and parents are led by the promise of winning attorney's fees to litigate in even more cases.

FOOTNOTES

1. 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690.
2. Public Law 94-142, 20 U.S.C. § 1401 et seq.
3. 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979).
4. 29 U.S.C. § 794 et seq.
5. "The Supreme Court and the Education of Handicapped Children," September 1982.
6. Clevenger v. Oak Ridge, 744 F.2d 514 (6th Cir. 1984).
7. Monahan v. Nebraska, 575 F. Supp. 132 (D. Nebr. 1983).
8. The Civil Rights Act of 1871, 42 U.S.C. § 1983.
9. 102 S.Ct. 3034, 3049.
10. 104 S.Ct. 3371 (1984).
11. 20 U.S.C. § 1401 (a)(17).
12. 34 C.F.R. §§ 300.13 and 300.346.
13. Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979).
14. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980).
15. Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981), aff'd. 703 F.2d 823 (5th Cir. 1983).
16. 104 S.Ct. 3371, 3377.

17. 104 S.Ct. 3371, 3378.
18. 104 S.Ct. 3371, 3379.
19. Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984), cert. denied, 105 S.Ct. 2360 (1985).
20. See also Hymes v. Hartnett County, 664 F.2d 410 (4th Cir. 1981) in which the Fourth Circuit assumed that replacement of a tracheostomy tube and suctioning of mucus are related services..
21. Compare Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981) and Darlene L. v. Illinois State Board, 568 F. Supp. 1340 (N.D. Ill. 1983).
22. T.G. v. Board of Education, 576 F. Supp. 420 (D. N.J. 1983), aff'd 738 F.2d 425 (3rd Cir. 1984) cert. denied sub nom. Piscataway Board of Education v. T.G., 105 S.Ct. 592 (1984).
23. See Stemple v. Board, 623 F.2d 893 (4th Cir. 1980); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); and Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984).
24. 20 U.S.C. § 1415 (E)(3).
25. 623 F.2d 893 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981).
26. See Zvi D. v. Ambach, 694 F.2d 904 (2nd Cir. 1982); Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1981); and Mountain View v. Sharron, 709 F.2d 28 (9th Cir. 1983).
27. See Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984).
28. 105 S.Ct. 1996 (1985).
29. See the Supreme Court's summary of the procedural history of the case at 105 S.Ct. 1998-2002.
30. 105 S.Ct. 1996, 2003-5.
31. 105 S.Ct. 1996, 2003.
32. 105 S.Ct. 1996, 2004.
33. See Quackenbush v. Johnson, 716 F.2d 141 (2nd Cir. 1983); Department v. Katherine D., 727 F.2d 809 (9th Cir. 1983); and Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982).
34. 104 S.Ct. 3457 (1984.)
35. 105 S.Ct. 1996, 3466-3474.
36. H.R. 1523 and S. 415 99th Congress, 1st Session.
37. See Monahan v. Nebraska, 575 F. Supp. 132 (D. Nebr. 1983).

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